Supreme Court, U.S.
FILED

10-812 OCT 15 2010

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

Richard Joel Domnitz,

Petitioner,

v.

Lee M. Reese, M.D., Feza N. Gunalp, M.D.,
and Sunrise Mountainview Hospital, Inc.,
d/b/a Mountainview Hospital,

Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of the State of Nevada

PETITION FOR WRIT OF CERTIORARI

Daniel Markoff, Esq.
Markoff & Boyers
820 S. 7th Street, Suite A
Las Vegas, Nevada 89101
(702) 383-3327

QUESTIONS PRESENTED FOR REVIEW

1. Is a state statute of limitations void for vagueness and violate due process of law under the 14th Amendment to the United States Constitution where the statute provides a shorter limitation based upon state of mind and a longer period based only on time?

2. Is it a violation of due process of law to bar a lawsuit based upon a person's state of mind, when no evidence presented as to a person's state of mind, and thereby unconstitutionally changes the statutory parameters of Nevada Revised Statutes 41A.097 from a subjective test to an objective test?

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of this case.

CORPORATE DISCLOSURE STATEMENT

The Petitioner is an individual. Petitioner is not filing this Petition on behalf of any corporate entity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Joel Domnitz respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court for the State of Nevada in this case.

OPINIONS BELOW

The opinion below is an unpublished Order of the Supreme Court of the State of Nevada.

STATEMENT OF JURISDICTION

1. The Order was entered on the 20th day of July, 2010.

2. This petition is filed pursuant to United States Code 28 U.S.C. § 1257(a).

3. Constitutional provisions United States Constitution Amendment 14, section 1, in pertinent part, "No state shall *** deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

4. 28 U.S.C. § 2403(b) may apply.

CONSTITUTIONAL PROVISIONS AT ISSUE

United States Constitution 14th Amendment, due process clause.

STATEMENT OF THE CASE

This petition for certiorari arises from a dismissal of a Complaint for medical malpractice. The Nevada Supreme Court upheld a dismissal of a Complaint based upon the statute of limitations set forth in Nevada Revised Statutes (NRS 41A.097(2)). The issue as it is presented here arose by the failure of the Nevada Supreme Court to:

1. Apply any of the factors contained in its own case law regarding factors to be considered under NRS 41A.097(2).

2. Created constitutional ambiguity by affirming the lower court's decision of dismissal. The lower court had no evidence presented before it to justify the application of the statute of limitations as to what Petitioner knew or should have known.

The federal question could not be raised in the regular course of the proceedings because the Nevada Supreme Court's Order itself created the issue for review here. Had the Nevada Supreme Court simply followed the factors set forth in its own case law, no due process issues would be present, and there would not be a constitutionally vague statute.

This problem is apparent by reference to the Nevada Supreme Court's affirmance of the District Court's Order of dismissal based upon

NRS 41A.097(2) and reference to Massey v. Litton, 99 Nev. 723, 669 P.2d 248 (1983).

The Court said, "The statute of limitations for medical malpractice commences when the plaintiff knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." (Appendix A, Order of Affirmance, p. 1) The Court then affirmed by simply saying the district court's finding that Petitioner had inquiry notice prior to a year before his Complaint was filed, and therefore, the statute of limitations expired before the Complaint was filed. (Appendix A, Order of Affirmance, p. 2)

By itself, this order appears simple. However, it is that very simplicity which creates the constitutional ambiguity. The Order ignores the Court's factors set forth in its own decision of Massey v. Litton, supra, and recreates the conflicting and complicated statutory provisions of NRS 41A.097(2). Had the Nevada Supreme Court simply applied the factors set forth in its own case law, the statutory ambiguity now created would not exist.

To appreciate this unusual situation, a review of NRS 41A.097(2) must be made in light of the case of Massey v. Litton, 99 Nev. 723, 669 P.2d 248 (1983).

REASONS FOR GRANTING THE PETITION

I. NRS 41A.097(2) PROVIDES FOR TWO PERIODS OF LIMITATIONS. THE FIRST BARS A MALPRACTICE ACTION WHEN A PERSON KNOWS OR SHOULD OF KNOWN HE SUFFERED A LEGAL INJURY. THE SECOND COMPLETELY BARS ANY ACTION FOR MALPRACTICE IF FILED THREE YEARS AFTER THE INJURY.

NRS 41A.097(2) states,

> "Except as otherwise provided in subsection 3, an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after plaintiff discovers or through the use of reasonable diligence should have discovered the injury whichever occurs first."

The Complaint in this case was clearly filed within the 3 year limitation period. However, it was filed more than 1 year after the Petitioner 's hospitalization and the alleged malpractice.

In February 2007, Petitioner was admitted to Sunrise Mountainview Hospital, Inc., d/b/a Mountainview Hospital, for an acute appendicitis. (Appendix 15) However, Petitioner had a long history of diabetes, sleep apnea, and other

physical problems (Appendix 16, 19). Because of Petitioner's respiratory complications, Petitioner was intubated during surgery. While the appendicitis surgery itself was unremarkable, Petitioner's doctors for some unknown reason decided to perform a "trial" extubation. This trial extubation occurred while Petitioner was unconscious. Petitioner's blood oxygen levels immediately desaturated. Petitioner's physicians tried repeatedly to reintubate Petitioner and finally succeeded. However, Petitioner later had to have a tracheotomy performed so he could breath. (Appendix 9)

Unfortunately, this trial extubation (which was unknown to Petitioner) led to other complications besides needing to perform the tracheotomy. These complications included severe infection in his neck and an additional month in the hospital, as well as a year in physical therapy. (Appendix 25)

As noted, Petitioner was never told by his doctors of the trial extubation or even the reason it was attempted. All that Petitioner knew was that following the appendicitis operation he had the tracheotomy which he associated with his severe respiratory problems with sleep apnea. Meanwhile, Petitioner remained under the care of Respondent Reese.

It was not until an acquaintance of Petitioner, Dr. Sterling Doubrava (who is an anesthesiologist) asked to see Petitioner's medical

records that he discovered a physician's notation that the trial extubation had been done. (Appendix 24)

Following Petitioner's discovery of this information by Dr. Doubrava, a Complaint was filed well within 1 year of that date.

The Respondents after service of the Complaint filed a Motion to Dismiss. It was based inter alia that the 1 year statute of limitations had expired. (Appendix 4-6)

The Respondents presented not a single piece of evidence, except Petitioner's physical injury, to show Petitioner knew or should have known that his complications were the result of medical malpractice. (Appendix 6) Instead, the District Court concluded, without any documentary evidence or testimony evidence whatsoever, that Petitioner was on "notice" of a malpractice claim simply because a tracheotomy had been performed. (Appendix 6-7)

In short, the District Court assumed what it thought Petitioner should have known, and on that basis, concluded the 1 year statute began running on about the time of his surgery.

This assumption on the part of the District Court ran perfectly contrary to the holding in Massey v. Litton, 99 Nev. 723 (1983). Massey v. Litton, supra, resolved the problems of what must be considered before concluding the 1 year statute

begins. In Massey v. Litton, supra, the Court clearly and unequivocally held that the term "injury" as used in NRS 41A.097(2) does not mean knowledge of the physical injury commences the running of the one year limitation. Rather, the term "injury" means when the patient knows or should have known be suffered a legal injury.

Massey v. Litton, supra, at 727, states, "The discovery may be either actual or presumptive, but must be of both the fact of the damage suffered and the realization that the cause was the health care provider's negligence." (Emphasis added).

There is no question Petitioner knew of his physical injury. However, there was absolutely no evidence that he either knew or should have known of any possible malpractice until Dr. Doubrava happened upon a very obscure notation. (Appendix 25)

The dismissal was then appealed to the Nevada Supreme Court, which issued the Order affirming the dismissal, and relied exclusively upon Massey v. Litton, supra. As can be seen from the Order, there was no analysis or discussion why the Massey v. Litton mandates affirmance, rather than reversal. When the holding of Massey v. Litton is examined, it clearly shows that none of its factors have been met which would invoke the running of the 1 year statute of limitations.

By this action, the Nevada Supreme Court has effectively taken a statute which allows a

person up to 3 years to discover if there was malpractice and leaves a plaintiff no choice but to file a complaint within 1 year of a person's physical injury regardless of whether there was known malpractice or not. The Court has thus changed the statute from what both the legislature and Nevada Supreme Court made (at one time) clear, and arbitrarily concluded a physical injury alone puts a person on notice of malpractice. The Nevada Supreme Court has now made the requirements of NRS 41A.097 so unconstitutionally vague by effectively eliminating the three year period within which to file a Complaint that was provided by the legislature.

Prior to the present case, a person reading NRS 41A.097 in conjunction with Massey v. Litton, supra, would conclude that he has up to three years to discover if he has been legally injured. But, now lurking, unknown to the unwary patient is the Nevada Supreme Court's unspoken rule that if you knew you suffered a physical injury, you are now automatically deemed to know you suffered a legal injury as well.

II. CONSTITUTIONAL RAMIFICATIONS OF A STATE SUPREME COURT ARBITRARILY CHANGING STATUTE OF LIMITATIONS REQUIREMENTS.

In the present case, the decision of the Nevada Supreme Court fundamentally changed the statute of limitations by requiring a person to file a medical malpractice case within 1 year,

regardless of whether he knows, or should have known, of his legal injury. It did so by affirming a district court's "finding" that a person should have known of his legal injury, even when there was no evidence except that the patient suffered a physical injury, which the Nevada Supreme Court previously held was insufficient. It is a fundamental foundation of due process of law that a decision maker must rest his decision on legal rules and evidence addressed at a hearing. The decision maker should, thus, state his reasons for his determination and the evidence relied on. Greene v. McElroy, 360 U.S. 474, 496 (1959) and Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

Thus, as a practical matter the Nevada Supreme Court, without explanation or analysis, has forced everyone to file within 1 year of this physical injury, even though the statute (and case law) allows up to 3 years to file a Complaint.

Such a unilateral judicial modification of the law violates fundamental procedural due process. Anyone who relies on the wording of NRS 41A.097 and Massey v. Litton, supra, will be sorely disappointed to find out that a 3 year period of limitations is meaningless because the Nevada Supreme Court will now impute knowledge of legal injury without anything to support that finding, except the physical injury itself. It has long been held that a statute be precise enough to give fair warning to actors that contemplate conduct will have certain consequences. See for example Lanzetta v. New Jersey, 306 U.S. 451

(1939) and Connolly v. General Construction Co., 269 U.S. 385 (1926). The state Supreme Court cannot say in one breath that physical injury alone is insufficient to start the limitations clock, and in the next breath, say that physical injury is sufficient with no explanation as to why.

III. IMPORTANCE OF GRANTING A PETITION FOR CERTIORARI.

This case shows that the legal process can be manipulated to the point where neither statutes nor case law mean anything. For the judicial system to have any guidance for the public in its affairs, there must be a statutory scheme that is understandable and judicial decisions that give clarity to otherwise problematic statutes. When that clarity is achieved, it must then be followed. Failure by state supreme courts to meaningfully follow their own stare decisis invites confusion, chaos and distrust of the legal system generally. That fundamental distrust and confusions has been created by the Nevada Supreme Court in this case.

Should this court not grant the Petition For Certiorari, the problem will remain, and litigants will proceed at their peril amidst uncertainty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court grant this Petition For Certiorari.

Dated this 14 day of October, 2010.

Respectfully submitted,

Daniel Markoff, Esq.
Markoff & Boyers
820 S. 7th Street, Suite A
Las Vegas, NV 89101
(702) 383-3327
Attorney for Petitioner
Richard Joel Domnitz

IN THE SUPREME COURT
OF THE STATE OF NEVADA

RICHARD JOE DOMNITZ,
Appellant,
vs.
LEE M. REESE, M.D.; FEZA N. GUNALP, M.D.; AND SUNRISE MOUNTAINVIEW HOSPITAL, INC. D/B/A MOUNTAINVIEW HOSPITAL,
Respondents.

No. 54055

FILED
JUL 20 2010
Tracie K. Lindeman
Clerk of Supreme Court
By /s/
Deputy Clerk

ORDER OF AFFIRMANCE

This is an appeal from district court orders granting motions to dismiss in a medical malpractice action. Eighth Judicial District Court, Clark County, Michelle Leavitt, Judge.

Having reviewed the briefs and appendices on appeal, we affirm the district court's orders based on appellant's failure to file the complaint within the limitations period. The statute of limitations for medical malpractice commences when the plaintiff "knows or, through the use of reasonable diligence, should have known of facts that would

put a reasonable person on inquiry notice of his cause of action." Massey v. Litton, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). The district court properly held that appellant had inquiry notice prior to a year before his complaint was filed, and therefore, the statute of limitations expired before appellant filed his complaint. NRS 41A.097(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[1]

/s/ _____, J.
Hardesty

/s/ _____, J.
Douglas

/s/ _____, J.
Pickering

cc: Hon. Michelle Leavitt, District Judge
Stephen E. Haberfeld, Settlement Judge
Markoff & Boyers
Hall Prangle & Schoonveld, LLC/Las Vegas
Law Office of Arthur W. Tuverson
Lemons, Grundy & Eisenberg
Eighth District Court Clerk

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1 We have determined that this appeal should be submitted for decision on the briefs and appellate record without oral argument. See NRAP 34(f)(1).

ORIGINAL

ORDR
Christina M. Alexander (9360)
HUTCHISON & STEFFEN, LLC
Peccole Professional Park
10080 W. Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086 Fax
calexander@hutchlegal.com
Attorneys for Defendant,
Lee M. Reese, M.D.

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Clerk of the Court

DISTRICT COURT
CLARK COUNTY, NEVADA

RICHARD JOEL DOMNITZ, Individually,	Case No. A582261
Plaintiff,	Dept. No. XII
v.	ORDER ON DEFENDANT LEE M. REESE, M.D.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT
SUNRISE MOUNTAINVIEW HOSPITAL, INC., d/b/d MOUNTAINVIEW HOSPITAL; LEE M. REESE, M.D.; FEZA N. GUNALP, M.D.; JOHN and JANE DOES I through X; and ROE ENTITIES I through X,	Date of Hearing: May 4, 2009
Defendants.	Time of Hearing: 8:30 a.m.

Defendant Lee M. Reese, M.D.'s Motion to Dismiss Plaintiff's Complaint, having come on for hearing on May 4, 2009, and Christina M. Alexander of the law firm of Hutchison & Steffen, LLC, appearing on behalf of Lee M. Reese, M.D., and Daniel Markoff of the law firm of Markoff & Boyers appearing on behalf of Plaintiff, the Court having heard oral arguments and having examined the records and documents on file in the above entitled matter and being fully advised in the premises, hereby finds as follows:

FINDINGS OF FACT

1. Plaintiff Richard Joel Domnitz underwent an appendectomy on or about February 11, 2007 at Mountainview Hospital with Lee M. Reese M.D. acting as surgeon and Feza N. Gunalp M.D. acting as anesthesiologist.

2. Plaintiff understood the procedure to be a "routine appendectomy" at the time of his surgery, as set forth within his moving papers and complaint.

3. Plaintiff was placed under general anesthesia during his appendectomy, such that a tube was placed in his throat to help with his respiration during the surgery of February 11, 2007.

4. Plaintiff was extubated, or had the tube removed, following the appendectomy surgery, with his condition deteriorating immediately thereafter, requiring an eventual tracheotomy on February 11, 2007.

5. Plaintiff subsequently experienced complications following the "routine appendectomy," including but not limited to the tracheotomy, with said complications being described by Plaintiff in his moving papers as "spending almost one month in the hospital with his throat cut open, infections, and a host of life threatening problems." In addition, Plaintiff asserts that he then "spent the next year following his one month hospitalization in rehabilitation and recovery." Further, Plaintiff alleged that 'to this day" he continued to suffer 'from the effects" of the complications of surgery.

6. The medical difficulties experienced by Plaintiff following what he believed would be a "routine appendectomy" should have put him on notice that a potential injury pursuant to NRS 41A.097 had occurred, said complications including "spending almost one month in the hospital with his throat cut open, infections, and a host of life threatening problems."

7. It is undisputed that Plaintiff was aware of the complications of the surgery, including the placement of a surgical tracheotomy, ventilator

assisted breathing, infections and having to remain in the hospital for almost one month beyond the time he had expected for the "routine appendectomy," said events being known to Plaintiff well before February 9, 2008.

8. Plaintiff's complaint against Drs. Reese and Gunalp was brought on February 11, 2009, over one year after Plaintiff knew or through the use of reasonable diligence should have known of the existence of his claimed injuries.

9. Plaintiff subsequently retained counsel to pursue a claim of medical malpractice on his behalf on an unknown date, but prior to February 9, 2009.

10. Plaintiff's complaint for medical malpractice was filed on February 9, 2009 almost two years after the date of the surgery in which he experienced the complications set forth more fully within his Complaint, his moving papers and as expressed via oral argument by his counsel on the date of the hearing of Defendant Reese's Motion to Dismiss.

CONCLUSIONS OF LAW

1. NRS 41A.097 requires, among other things, that a Plaintiff bring suit against a medical provider within one year from the time the Plaintiff discovers or through the use of

reasonable diligence should have discovered the injury.

2. A reasonable person would have been put on notice that a potential injury existed pursuant to NRS 41A.097 upon being made aware of the serious complications and extended hospital stay following what had initially been perceived to be a 'routine appendectomy" procedure.

3. A reasonable person would have been put on inquiry notice as required by NRS 41A.097 and as explored in Massey v. Litton 99 Nev. 723 (1983), that a potential legal injury existed well before February 9, 2008 based upon the same information that was available to Plaintiff prior to February 9, 2008.

4. Plaintiff's argument that he was recovering from the injuries sustained from the surgical complications and unable to form the requisite notice of having sustained a legal injury pursuant to NRS 41A.097 is not well founded.

5. A reasonable person wound have appreciated a connection between the extended hospital stay and resultant complications and the treatment provided by Drs. Reese and Gunalp on February 11, 2007.

6. Once Plaintiff was on inquiry notice of the injury, he could not wait for the facts to come

to him in his investigation of a claim of medical malpractice, but was required under NRS 41A.097 and related case law to investigate that claim in a timely manner.

7. Plaintiff's Complaint filed on February 11, 2009 was not timely and as a result must be dismissed under NRS 41A.097 for failure to bring the claim within the requisite statutory period of limitations as to Drs. Reese and Gunalp.

8. The affidavit of Plaintiff's expert was found to be sufficient for purposes of NRS 41A.071.

Therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Defendant Lee M. Reese, M.D.'s Motion to Dismiss Plaintiff's Complaint is granted based upon NRS 41A.097 as is the Joinder to said Motion by Defendant Feza N. Gunalp M.D. The oral request to join the motion following issuance of the Court's ruling on the date of the hearing by Defendant Mountainview Hospital was not timely and was not granted. Mountainview Hospital was advised to bring its own motion separately if it so desired.

DATED this 26 day of May, 2009.

/s/
DISTRICT COURT JUDGE

Submitted by:
HUTCHISON & STEFFEN, LLC

By: /s/
Christina M. Alexander (9360)
For the Firm
Peccole Professional Park
10080 W. Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Defendant,
Lee M. Reese, M.D.

NEO

KATE H. VRABEL, ESQ.
Nevada Bar No. 10262
TYLER M. CRAWFORD, ESQ.
Nevada Bar No. 10559
HALL PRANGLE &
SCHOONVELD, LLC
777 North Rainbow Blvd., Ste. 225
Las Vegas, Nevada 89107
Phone: 702-889-6400
Facsimile: 702-384-6025
kvrabel@hpslaw.com
tcrawford@hpslaw.com
Attorneys for Defendant Sunrise
MountainView Hospital, Inc. d/b/a
MountainView Hospital

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/s/
Clerk of the Court

DISTRICT COURT
CLARK COUNTY, NEVADA

RICHARD JOEL DOMNITZ, Individually,	Case No. A582261
	Dept. No. XII
Plaintiff,	
v.	
SUNRISE MOUNTAINVIEW HOSPITAL, INC., d/b/d MOUNTAINVIEW HOSPITAL; LEE M. REESE, M.D.; FEZA N. GUNALP,	

M.D.; JOHN and JANE)
DOES I through X; and)
ROE ENTITIES I through X,)
)
Defendants.)
)

ORDER

This matter having come on for hearing in the normal course, on July 6, 2009, before the Honorable Judge Michelle Leavitt, on Defendant, Sunrise Mountain View Hospital and Medical Center, Inc., d/b/a Mountain View Hospital's Motion to Dismiss Plaintiff's Complaint, filed by its counsel of record, the law firm of Hall Prangle & Schoonveld, LLC, with Opposition thereto filed by Plaintiff by and through his counsel of record, Daniel Markoff, Esq. of the law firm of Markoff & Boyers, the Court having reviewed the papers and pleadings on file, having heard the arguments of counsel and being fully advised in the premises. IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendant, Sunrise Mountain View Hospital and Medical Center, Inc., d/b/a Mountain View Hospital's Motion to Dismiss

Plaintiff's Complaint is GRANTED based upon NRS 41A.097.

DATED this 16 day of July, 2009.

/s/
DISTRICT COURT JUDGE

Submitted by:
HALL PRANGLE & SCHOONVELD, LLC

By: /s/
KATE H. VRABEL, ESQ.
Nevada Bar No. 10262
TYLER M. CRAWFORD, ESQ.
Nevada Bar No. 10559
HALL PRANGLE & SCHOONVELD, LLC
777 North Rainbow Blvd., Ste. 225
Las Vegas, Nevada 89107
Phone: 702-889-6400
Facsimile: 702-384-6025
kvrabel@hpslaw.com
tcrawford@hpslaw.com
Attorneys for Defendant Sunrise MountainView Hospital, Inc. d/b/a MountainView Hospital

COMP

Daniel Markoff, Esq.
Nevada Bar No. 000321
Markoff & Boyers
820 South 7th Street, Suite A
Las Vegas, Nevada 89101
(702) 383-3327
Attorney for Plaintiff
RICHARD JOEL DOMNITZ

FILED

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/s/
Clerk of the Court

DISTRICT COURT
CLARK COUNTY, NEVADA

RICHARD JOEL DOMNITZ, Individually,	Case No. A582261
	Dept. No. XII
Plaintiff,	
v.	
SUNRISE MOUNTAINVIEW HOSPITAL, INC., d/b/d MOUNTAINVIEW HOSPITAL; LEE M. REESE, M.D.; FEZA N. GUNALP, M.D.; JOHN and JANE DOES I through X; and ROE ENTITIES I through X,	
Defendants.	

COMPLAINT

Hearing Date: N/A
Hearing Time: N/A

COMES NOW Plaintiff RICHARD JOEL DOMNITZ, by and through his attorney Daniel Markoff, Esq., of the law firm Markoff & Boyers, and complains against Defendants SUNRISE MOUNTAINVIEW HOSPITAL, INC., d/b/a MOUNTAINVIEW HOSPITAL (hereinafter "MOUNTAINVIEW"), LEE M. REESE, M.D., and FEZA N. GUNALP, M.D. as follows:

BACKGROUND ALLEGATIONS

I

At all times herein, Plaintiff RICHARD DOMNITZ was and is a resident of Clark County, Nevada.

II

At all times mentioned herein defendant MOUNTAINVIEW was a hospital doing business in the State of Nevada, duly licensed to operate as a hospital under the law of the State of Nevada and through its agents, employees, and representatives. The above named defendant, at all times herein, held itself out to the public, and to Plaintiff, as having medical and surgical staff who are skilled, careful and diligent in the practice of the profession of medicine and/or

surgery, and other specialties having to do with the care and treatment of patients.

III

Upon information and belief, defendant LEE M. REESE, M.D., was at all times herein a resident and practicing medicine in Clark County, Nevada.

IV

Upon information and belief, defendant FEZA N. GUNALP, M.D., was at all times herein a resident and practicing medicine in Clark County, Nevada.

V

The true names and capacities, whether individual, corporate, associate or otherwise of defendants named herein as John and Jane Does, I through X, and Roe Entities, I through X, are unknown to Plaintiff, who therefore sue said defendants by such fictitious names. Plaintiff is informed and believes and therefore alleges that each of the defendants designated herein as Does and Roe Entities are responsible in some manner for events referenced herein and proximately caused damages to Plaintiff as herein alleged. Plaintiff will ask leave of the Court to amend this Complaint to insert the true names and capacities

of John and Jane Does, I through X, and Roe Entities, I through X, when the same have been ascertained and to join such defendants in this action.

VI

On or about February 11, 2007, at approximately 12:30 p.m., Plaintiff DOMNITZ arrived at MOUNTAINVIEW with abdominal pain for the purpose of obtaining a diagnosis and treatment relative to said abdominal pain, which was later determined to be appendicitis. Plaintiff employed Defendants, and each of them, to care for and treat him and to do all things necessary and proper for such care and treatment.

VII

Defendant REESE, according to the records of MOUNTAINVIEW, was the surgeon assigned to operate on Plaintiff DOMNITZ for an acute appendicitis on or about February 11, 2007. As such, on information and belief, Defendant REESE was, therefore, in charge of the operation on the Plaintiff at MOUNTAINVIEW.

VIII

Defendant GUNALP was, according to the records of MOUNTAINVIEW, the anesthesiologist

assigned to Plaintiff DOMNITZ during the operation for appendicitis at MOUNTAINVIEW.

IX

On information and belief, Defendants MOUNTAINVIEW, REESE, AND GUNALP were aware prior to the surgery that Plaintiff DOMNITZ had significant respiratory difficulties.

X

On information and belief, Defendants REESE AND GUNALP are physicians licensed to practice medicine in the State of Nevada. Furthermore, on information and belief, Defendant MOUNTAINVIEW provided said physicians to Plaintiff for the purpose of placing Plaintiff under anesthesia and performing the procedures necessary to treat Plaintiff DOMNITZ for acute appendicitis.

XI

The Defendants, and each of them, undertook said employment and undertook to diagnose Plaintiff's condition and to care for and treat Plaintiff, to do all things necessary and proper in connection with his treatment by and through their employees and agents.

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XII

Upon information and belief, the Defendants and each of them were aware, or should have been aware, of Plaintiff DOMNITZ'S significant respiratory condition of sleep apnea.

XIII

After the Defendants caused anesthesia to be administered to Plaintiff DOMNITZ, Plaintiff was rendered totally unconscious and was under the complete control of said Defendants.

XIV

Prior to surgery on or about February 11, 2007, Defendants jointly and/or severally cause Plaintiff DOMNITZ to be intubated for the purpose of assisting Plaintiff to breath during the surgery.

XV

Following said surgery, Defendants jointly and/or severally, through either themselves or their agents, caused Plaintiff DOMNITZ to be extubated. Upon information and belief, Plaintiff was extubated in the operating room at or near the end of surgery.

XVI

Commencing on or about the 11th day of February, 2007, and continuing thereafter, Defendants, and each of them, so negligently and carelessly caused for and treated Plaintiff by omission or by the use of instrumentation, medicines, and procedures, the exact nature of which is unknown to Plaintiff, thereby damaging Plaintiff. Said instrumentation, medicines and procedures were under the sole and exclusive custody of Defendants and each of them. Defendants, and each of them, so negligently and carelessly engaged in medical care of Plaintiff that Plaintiff did suffer severe personal injury, extensive additional hospitalization, procedures, disability and pain. Plaintiff placed himself under the care and attention of Defendants, and each of them, and was to be provided with complete and adequate care and attention as well as other necessary medical services that Defendants promised and undertook to faithfully, skillfully and carefully test, advise, treat and care for Plaintiff.

FIRST CLAIM FOR RELIEF
(NEGLIGENCE)

XVII

Plaintiff Domnitz realleges and incorporates paragraphs I through VI.

XVIII

Defendants, and each of them, owed a duty of due care to Plaintiff. Defendants, and each of them, breached that duty of care in the following manner, including but not limited to:

A. Failure to take adequate and safe precautions against exacerbating physical conditions that Defendants were aware, or should have been aware, that Plaintiff had.

B. Failure to maintain Plaintiff on adequate respiratory care during and/or his surgery for appendicitis.

C. Failure to adequately monitor and maintain Plaintiff's respiratory status and condition.

D. Failure to adequately care for Plaintiff's hydration levels and blood chemistry.

E. Failure to adequately care for and/or monitor Plaintiff's skin condition so as to avoid open wounds forming.

F. Failure to adequately monitor and/or care for Plaintiff so as to avoid damage to his legs.

G. Failure to adequately care for Plaintiff so as to avoid internal bleeding.

H. Failure to adequately monitor and/or care for Plaintiff's respiratory condition so as to obviate the need for a tracheotomy.

I. Failure to adequately monitor and/or care for Plaintiff so as to avoid the need of approximately a four (4) week stay in defendant MOUNTAINVIEW hospital and years of physical rehabilitation following release.

J. Failure to adequately care and/or monitor Plaintiff's physical condition so as to avoid needless hospitalization, pain and suffering, and permanent physical injury to Plaintiff.

XIX

As a result of Defendants' breach of care, Plaintiff has been damaged, including but not limited to the following: By having to endure a tracheotomy, infections, physical and mental pain, anguish and suffering, along with permanent damage, disability, and physical disfigurement of his body.

XX

The damages suffered by Plaintiff were directly and proximately caused by the negligence and carelessness of Defendants, and each of them.

XXI

Plaintiff has suffered general and special damages in excess of $10,000.00.

XXII

The allegations as represented and set forth herein have been reviewed by Sterling M. Doubrava M.D. See Affidavit of Sterling M. Doubrava M.D. attached hereto and incorporated herein as Exhibit 1.

XXIII

It has been necessary for Plaintiff to retain an attorney to prosecute this action, and Plaintiff is therefore entitled to attorneys' fees and costs.

SECOND CLAIM FOR RELIEF
(OPPRESSION)

XXIV

Plaintiff Domnitz realleges and incorporates paragraphs I through XIII set forth above.

XXV

Defendants' conduct as herein stated was committed with a conscious disregard for the rights of Plaintiff and with reckless disregard of

the effect of their actions, such as to constitute oppression under Nevada Revised Statutes. As a direct and proximate result of this conduct, Plaintiff is entitled to punitive damages in a sum sufficient to punish, set an example, and to deter such conduct in the future.

XXVI

That it has been necessary for Plaintiff to retain counsel in this matter and is entitled to attorneys' fees and costs of suit incurred herein.

WHEREFORE, Plaintiff RICHARD JOEL DOMNITZ prays against Defendants, and each of them, as follows:

1. For general damages in excess of $10,000.00.

2. For special damages in excess of $10,000.00.

3. For prejudgment interest.

4. For an award of attorneys' fees and costs of suit incurred herein.

5. For punitive damages.

6. For such other and further relief as the Court may deem just and proper in the premises.

DATED this 6 day of February, 2009

/s/ _____

Daniel Markoff, Esq.
Markoff & Boyers
Nevada Bar No. 000321
820 South 7th Street, Suite A
Las Vegas, Nevada 89101
Attorney for Plaintiff
RICHARD JOEL DOMNITZ

EXHIBIT 1

EXHIBIT 1

AFFIDAVIT OF STERLING M. DOUBRAVA, MD

STATE OF NEVADA)
) :ss
COUNTY OF CLARK)

Sterling M. Doubrava, MD, being first duly sworn, deposes and says:

1. Affiant is a board certified anesthesiologist licensed to practice medicine in Nevada and Arizona. As such, I am familiar with the treatment of and standard of care of hospitals and/or physicians caring for surgical patients with respiratory conditions. I have had an opportunity to review the medical records regarding Richard Domnitz's hospitalization commencing on February 11, 2007, and thereafter. I have also become familiar with Mr. Domnitz's past medical and respiratory history.

2. The medical records for Mr. Domnitz show that he was brought to MountainView Hospital for abdominal pain on or about February 11, 2007. Mr. Domnitz was taken to the MountainView Hospital surgery. It was eventually determined that Mr. Domnitz was suffering from acute appendicitis. There is no indication that Mr. Domnitz was in need of treatment for any other physical condition. However, Mr. Domnitz's hospital records upon

admission show him to have sleep apnea, thereby requiring close supervision.

3. When Mr. Domnitz was anesthetized for surgery for his appendicitis, hospital records indicate that he was intubated. Those same records further reflect that soon after the surgery was completed, the anesthesiologist did a "trial extubation." However, Mr. Domnitz immediately desaturated. There were three attempts at reintubation. Ultimately, Mr. Domnitz had to have a tracheostomy.

3. Despite the fact the personnel at MountainView Hospital knew of Mr. Domnitz's respiratory condition (sleep apnea), the staff prematurely extubated Mr. Domnitz. This premature extubation was the direct cause of repeated attempts at reintubation, and ultimately the need to perform a tracheostomy. These subsequent intubation attempts and tracheotomy led directly to further complications, including but not limited to, open wounds which became infected on Mr. Domnitz's neck, neurological complications, and other related complications. All of this required an extended hospital stay lasting months and extended rehabilitation, resulting in permanent injury, disability, and scarring.

4. In my opinion, to a reasonable degree of medical certainty, the hospital staff's failure to properly care for Mr. Domnitz's sleep apnea for an

appendectomy (with associated procedures) which led directly to Mr. Domnitz's respiratory failure, subsequent repeated intubation attempts, surgeries, wounds, scarring, and permanent damage to his body. It was inappropriate to perform a "trial extubation" of Mr. Domnitz immediately following his surgery for appendicitis. It is further my opinion to a reasonable degree of medical certainty, if Mr. Domnitz had remained intubated following his surgery, and on ventilatory support, that Mr. Domnitz would not have had to suffer three (apparently traumatic) subsequent intubation attempts, a tracheostomy, and all the related complications that developed as a result of his stay at MountainView Hospital.

5. The foregoing is true and accurate to the best of affiant's information and belief.

Dated this 6 day of February, 2009.

/s/
Sterling M. Doubrava, MD

SUBSCRIBED AND SWORN to before me
this 6th day of February, 2009.

/s/
NOTARY PUBLIC in and for said
County and State.

The Great Seal of the State of Nevada

Connie Jones
Notary Public State of Nevada
Date Appointment Exp: 11-22-2009
Certificate No: 94-2650-1

Supreme Court, U S
FILED
JAN 2 0 2011
OFFICE OF THE CLERK

No 10-812

In The
SUPREME COURT OF THE UNITED STATES

Richard Joel Domnitz,

Petitioner,

v

Lee M Reese, M.D , Feza N. Gunalp, M.D., and Sunrise Mountainview Hospital, Inc., d/b/a Mountainview Hospital,

Respondents.

RESPONDENT FEZA N. GUNALP, M.D.'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jane Eberhardy, Esq.
Law Offices of Arthur W Tuverson
7201 West Lake Mead Blvd, #410
Las Vegas, Nevada 89128
Attorney for Respondent,
Feza N. Gunalp, M D
(702) 631-7855

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25

QUESTIONS PRESENTED FOR REVIEW

Respondent, FEZA N. GUNALP, M D., objects to Petitioner's Questions Presented for Review as they are based upon misstatements and misapplications of Nevada Law. In particular, as discussed more fully in the body of the Opposition, the trigger which activates the one (1) year discovery statute of limitations is not patient's "state of mind " The trigger is activated by an analysis of facts, which were available to the patient, and whether those facts were sufficient to put a reasonable person on inquiry notice of the possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice. Further, the test of NRS § 41A.097(2) is an objective reasonable man test not a purely subjective test.

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of this case

CORPORATE DISCLOSURE STATEMENT

Respondent, FEZA N. GUNALP, M.D., is an individual and is filing this Opposition to Petition for Writ of Certiorari in his capacity as an individual and not
on behalf of any corporation.

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STATEMENT OF JURISDICTION

It is respondent's belief that as Petitioner did not raise the issue he seeks to have heard on his Petition for Writ of Certiorari at the state court levels, and also failed to comply with Nevada Revised Statute § 30.130 and Nevada Rules of Appellate Procedure 44 by notifying the Nevada Attorney General of his concerns regarding the constitutionality of NRS § 41A.097(2) that he has waived any right to have the U.S. Supreme Court review this issue, which was never briefed or heard at the lower court level

STATEMENT OF THE CASE

Richard Joel Domnitz, Petitioner, filed a *Petition for Writ of Certiorari* questioning for the first time the constitutionality of the Nevada Supreme Court's Decision affirming the findings of fact and law as presented in the District Court Judge's Decisions of May 26, 2009 and July 16, 2009 The District Court Judge, after considering the factual evidence in this matter - including the fact that Mr. Domnitz went to the hospital for a routine appendectomy on February 9, 2007 and ended up hospitalized for a month and underwent therapy for over a year, determined that the medical difficulties experienced by Mr. Domnitz following what he believed would be a routine appendectomy should have put him, or any other

reasonable man, on notice that a potential injury pursuant to NRS § 41A.097 had occurred.

In reaching their decisions the District Court Judge and the Three Nevada Supreme Court Judges properly applied the criteria outlined in NRS § 41A 097 as clarified and explained by Massey v. Litton, 99 Nev 723, 727-728, 669 P.2d 248,251-252 (1983.) Petitioner's *Petition for Writ of Certiorari* should be denied

AREAS OF FACTUAL DISPUTE & CLARIFICATION

Petitioner was admitted to Sunrise Mountainview Hospital in February of 2007 for a routine appendectomy. During the surgery Dr. Feza Gunalp performed anesthesiology on Petitioner including intubation A trial extubation was performed which was unsuccessful requiring Dr Gunalp to re-intubate the petitioner After several attempts Petitioner was re-intubated Due to continuing problems a tracheotomy was performed several days later. Petitioner underwent numerous complications as a result of the surgery and remained hospitalized for a month However, the only time Dr. Gunalp had contact with Petitioner was during the appendectomy surgery. He did not continue to treat Petitioner and never hid what he did during Petitioner's treatment.

Petitioner obtained his medical records, approximately 2,000 to 2,500 pages in September of 2007. The requesting of medical records can be an important factor in determining when a patient discovers their injury. Rumstrom v. Allen, 345 Mont. 314, 321-324, 191 P.3d 410, 414-416 (2008) and Grooms v. Professionals Ins. Co., 507 N W 2d 121, 124 (Wis. Ct App. 1993). Petitioner had ample opportunity to explore the issue of potential malpractice long before the records were reviewed by Dr. Doubrava, Plaintiff's expert over a year later. Review of those records was not performed by Plaintiff's expert until October 30, 2008.

REASONS PETITIONER'S *WRIT OF CERTIORARI* SHOULD NOT BE GRANTED.

1 PETITIONER HAS WAIVED ANY RIGHT TO RAISE A FEDERAL QUESTION AS TO THE CONSTITUTIONALITY OF THE ONE (1) YEAR DISCOVERY STATUTE OF LIMITATIONS AS CONTAINED IN NRS §41A.097 AS THIS ISSUE WAS NOT RAISED TIMELY IN THE COURTS BELOW.

As Petitioner Domnitz acknowledged in his *Petition for Writ of Certiorari*, He has never brought the issue of the constitutionality of NRS 41A.097(2) before any of the lower courts. *See, (Petition for Writ of Certiorari*, Page 2, Paragraph 4.) "It is generally understood that constitutional

issues not raised in earlier civil proceedings are waived on appeal." Bettencourt v. City and County of San Francisco, 146 Cal. App. 4th 1090, 53 Cal. Rptr.3d 402 (2007). Nevada law notes that "a point not urged in the trial court, unless it goes to jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." Old Aztec Mine v. Brown, 97 Nev. 49, 52, 623 P 2d 981. 983 (1981) *See also,* Britz v Consolidated Casinos Corp., 87 Nev. 441, 488 P 2d 911 (1971) and Durango Fire Protection, Inc v. Troncoso, 120 Nev. 658, 98 P.3d 691 (2004). The U.S Supreme Court will not review what the Court below did not decide. Walters v. City of St. Louis, Mo , 347 U S. 231, 74 S. Ct. 505 (1954) It is only the most exceptional of cases which are reviewed where the question was not pressed or passed on below Duignan v. United States, 274 U.S. 195, 47 S Ct. 566, 71 L.Ed. 996 (1927).

There is nothing extraordinary or exceptional about the issue Mr. Domnitz attempts to raise in his *Petition for Writ of Certiorari* He simply attempts to challenge the constitutionality of NRS § 41A 097(2) for the first time In so doing he violates Nevada law and bypasses safeguards which would have allowed this matter to be addressed by the representatives of the State of Nevada at the lower court levels

When the constitutionality of a statute is challenged in the State of Nevada the Nevada Revised Statutes require that the Attorney

General be notified and made a party to the action so the State can be heard on the issue. NRS § 30.130.[1]

Nevada Rules of Appellate Procedure, Rule 44 also requires that the Attorney General be notified of any matter which questions the constitutionality of a legislative act where the state or its agency, officer or employee is not a party so that the Attorney General may represent the state on the disputed issue.[2]

In the present matter Petitioner did not raise the issue of constitutionality of NRS § 41A.097(2) at either the trial court level or the State Supreme Court appellate level Nor did he ever make the Nevada Attorney General aware of any contemplated challenge to the statute Therefore, his argument that NRS § 41A.097 is unconstitutional should be deemed waived and the *Petition for Writ of Certiorari* denied.

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[1] When declaratory relief is sought, all persons shall be made parties, who have or claim any interest which would be affected by the declaration if the statute is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceedings and be entitled to be heard NRS § 30 130

[2] If a party questions the constitutionality of an Act of the Legislature in a proceeding I which the state or its agency, officer or employee is not a party in an official capacity, the questioning party shall give written notice to the clerk of the Supreme Court immediately upon the filing of the docketing statement or as soon as the question is raised in the court The Clerk shall then certify that fact to the Attorney General NRAP 44

2. NRS § 41A.097(2) IS NEITHER VAGUE NOR UNCONSTITUTIONAL ON ITS FACE.

In his question no. 1, Petitioner questions the constitutionality of Nevada Revised Statute 41A.097(2) *for the first time* with his *Petition for Writ of Certiorari* to this Court In phrasing his first question for consideration by the Court he seems to indicate that NRS 41A.097 is unconstitutionally vague and violates 14th amendment due process law as it has a shorter statute of limitation triggered by "discovery of injury"[3] and potential malpractice and a longer statute of limitations based upon the actual date malpractice may have occurred based upon the date that medical services were provided. The determination of which statute applies is triggered by whichever occurs sooner, either discovery of injury by the patient, or that the requisite time specified from the medical procedure expires.

Statutes of limitation are creatures of the legislature and not the judiciary They are by definition arbitrary, their operation does not discriminate between the just and unjust claim.

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[3] Petitioner incorrectly states that the shorter statute of limitation is based upon patient's "state of mind "

They exist to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared and evidence has been lost. Chase Security Corporation v Donaldson, 325 U S 304, 314, 65 S. Ct. 1137, 1142, 89 L.Ed 1628 (1945). Statutes of limitations are established to cut-off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. Kavanagh v. Noble, 325 U.S. 535, 539, 68 S.Ct 235, 92 L Ed. 150 (1948). Courts are not authorized to rewrite a statute because they might deem its effects susceptible to improvement. Badaracco v. Commissioner of Internal Revenue, 464 U.S 386, 104 S.Ct. 756, 78 L Ed. 2d 549 (1984) Further, it has long been recognized that the establishment of statutes of limitation are within the jurisdictional power of the legislature of the state. Kuperman v. Assessment Appeals Bd. No 1, 137 Cal. App 4th 918, 931 (Cal. App 4th Dist. 2006)

> A constitutional right is always subject to reasonable statutory limitations as to the time within which to enforce it, if the constitution itself does not provide otherwise. The power of the legislature to provide reasonable periods of limitations, therefore, is unquestioned, and the fixing of time limits within which a particular right must be asserted is a matter of

> legislative policy the nullification of which is not a judicial prerogative Id

In the present matter the Nevada State Legislature passed NRS 41A.097 In the parts pertinent to this Petition it states

> (2) Except as otherwise provided in subsection 3, an action for injury or death against a provider of health care may not be commenced more that 3 years after the date of injury ***or*** 1 year after Plaintiff discovers or through the use of reasonable diligence should have discovered the injury **whichever occurs first**, for (a) injury to or wrongful death of a person occurring on or after October 1, 2002. [4] (Emphasis added).

The statute of limitations, like any other statute, is to be construed according to the manifest intention of the Legislature, and in ascertaining such intention, the language used should be construed, if possible, according to the usual meaning of the words. Wren v. Dixon, 40

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[4] Prior to the 2002 amendment the statute of limitations was four years after the date of injury or two years after the Plaintiff discovers or through the use of reasonable diligence should have discovered the injury whichever occurs first

Nev. 170. 161 P. 722 (1916). *See also,* Kuperman v. Assessment Appeals Bd. No. 1, 137 Cal. App 4th 918, 931 (Cal App 4th Dist. 2006)

Contrary to Petitioner's argument, Nevada Revised Statutes 41A.097(2) is neither vague nor unconstitutional because it provides for two potential statutes of limitations; and further provides the basis for selection of the controlling statute of limitations as "*whichever occurs first*."

Giving the language of the statute its usual and ordinary meaning, in complete context, it is clear that when a patient has discovered or should have discovered that he was injured and that the injury was potentially the result of medical malpractice he has a one year window to investigate the potential malpractice and bring a lawsuit. The Nevada Supreme Court has defined "injury" as contained in the statute to mean "legal injury." They have further defined when and how a patient discovers their legal injury. "Discovery may be either actual or presumptive " Massey v Litton, M.D., 99 Nev. 723, 727, 669 P 2d 248,251 (1983.) However, "discovery. . . must be of both the fact of damage suffered and the realization that the cause was the health care provider's negligence " Id. The Nevada Supreme Court has further clarified when the one year discovery statute of limitations begins to run. "The statute of limitations begins to run when the patient has before him or her facts which would put a reasonable person on inquiry notice of the

possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice. **The focus is on the patient's knowledge or on access to facts, rather than on her discovery of legal theories.** Massey v. Litton, 99 Nev. 723, 727-728, 669 P.2d 248,251-252 (1983)(Emphasis added.)

Pursuant to the language of Massey v Litton, *supra,* the standard to trigger the one year discovery statute of limitations is not the patient's subjective knowledge. The standard is a reasonable man standard and is determined by what facts are known to the patient and whether a reasonable man with access to those facts would be on inquiry notice of potential malpractice. If so the statute of limitations begins to run

If the patient is not on inquiry notice or has no reason to be on inquiry notice then the three (3) year statute of limitations runs from the time the medical procedure was performed.

The language of NRS 41A.097(2) is not so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application as discussed in Connally v. General Construction Co., 269 U S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). The facts of Connally v. General Construction Co , *Supra*, Lanzetta v. New Jersey, 306 U.S. 451 (1939), and Greene v McElroy, 360 U.S. 474(1959) are inapposite to the present matter

It appears from the language of paragraph 4 of Page 2 of Mr. Domnitz's *Petition for Writ of Certiorari* that Petitioner himself does not have any problem with the actual language of the statute only with its application to his case. He specifically concedes the statute is neither vague nor unconstitutional as written. He states;

> The federal question could not be raised in the regular course of the proceedings because the Nevada Supreme Court Order itself created the issue for review here. Had the Nevada Supreme Court simply followed the factors set forth in its own case law, no due process issues would be present, and there would not be a constitutionally vague statute (Petition, Page 2, Paragraph 4)

The statute as written and as interpreted by the Nevada Supreme Court in Massey v. Litton, 99 Nev 723, 727-728, 669 P.2d 248,251-252 (1983) is neither vague nor in violation of the 14th Amendment Due Process Clause of the U S. Constitution This Court should uphold the findings and Order of the Eighth Judicial District Court and the Nevada Supreme Court and deny Mr. Domnitz' *Petition for Writ of Certiorari*

3 NRS § 41A 097(2) DOES NOT RELY ON THE SUBJECTIVE STATE OF MIND OF A PATIENT TO DETERMINE WHEN THE ONE (1) YEAR DISCOVERY STATUTE OF LIMITATIONS IS TRIGGERED.

In his question for Review No. 2 Petitioner again misconstrues Nevada law and the facts of this case Mr Domnitz states that NRS § 41A 097(2) relies on a "person's state of mind" to bar a lawsuit. He then argues there was no evidence of Domnitz's "state of mind" in this matter.

As discussed above the factors which determine whether a person knows or should know that his physical injury was or may have been the result of medical malpractice is what facts he is aware of and whether those facts were sufficient to put a reasonable man on inquiry notice of a potential medical malpractice lawsuit

Pursuant to the language of Massey v. Litton, 99 Nev. 723, 727-728, 669 P 2d 248,251-252 (1983) the standard to trigger the one year discovery statute of limitations is not the patient's subjective knowledge The standard is a reasonable man standard and is determined by what facts are known to the patient and whether

a reasonable man with access to those facts would be on inquiry notice of potential malpractice

If the test were the subjective state of mind of the patient, as advocated by Petitioner, then it would be very easy to defeat the discovery statute of limitation by claiming ignorance of the malpractice or possibility of malpractice. (This is exactly what Petitioner is trying to do.) It would be very difficult to refute such allegations, whether or not true, without proceeding to full trial That is why it is knowledge of facts not legal theories which initiates the running of the one year statute of limitations Hershberger v Akron City Hospital, 34 Ohio St. 3d 1, 5, 516 N.E.2d 204, 207 (1987) *Compare,* Massey v. Litton, 99 Nev. 723, 727-728, 669 P.2d 248,251-252 (1983).

The Court in Hershberger v. Akron City Hospital, 34 Ohio St. 3d 1, 5, 516 N.E.2d 204, 207 (1987) defines injury as follows:

> We find the better construction of the term "injury" is set forth in the third approach. Therefore, in a medical malpractice action, for the purposes of determining the accrual date in applying the statute of limitations. the trial court must look to the facts of the particular case and make the following determinations: when the injured party became aware, or should have

> become aware, of the extent and seriousness of his condition, which, of course, may occur without the necessity of further medical consultation; whether the injured party was aware, or should have been aware, that such condition was related to a specific professional medical service previously rendered him; and whether such condition would put a reasonable person on notice of need for further inquiry as to the cause of such condition. Id [5] (Emphasis added.)

4 THE NEVADA SUPREME COURT PROPERLY APPLIED THE LANGUAGE, FACTORS, AND DEFINITIONS CONTAINED IN NRS §41A.097(2) AND MASSEY V LIBBEY TO THE FACTS IN THIS MATTER.

In the present matter the District Court Judge and the participating Nevada Supreme Court Judges followed the law as outlined in NRS § 41A.097(2) and Massey v. Litton, 99 Nev. 723, 727-728, 669 P 2d 248,251-252 (1983). An examination of the "Order on Defendant Lee M. Reese, M D 's Motion to Dismiss Plaintiff's

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[5] This is precisely the approach outlined in Massey v Litton, M D , 99 Nev 723, 669 P 2d 248 (1983)

Complaint", which is attached to Mr. Domnitz's *Petition for Writ of Certiorari* as Appendix "B" demonstrates the thought processes of the District Court Judge and her utilization of the Massey v. Litton factors in determining that a reasonable man, with access to the facts at Mr. Domnitz's disposal, would have made the connection between his injuries and the medical procedures of February 11, 2007 and been on inquiry notice of the potential malpractice and the need to further investigate and file a suit within one year. As outlined in the "Order" there was sufficient factual basis for the District Court Judge to determine that a reasonable man would have been on inquiry notice of the possible cause of action The three judge panel of the Nevada Supreme Court similarly determined, after review of the briefs and appendices to the State Court Appeal that based upon the factors outlined in Massey v. Litton, M D , 99 Nev. 723, 728, 669 P.2d 248, 252 (1983) the district court was correct in its determination that Mr. Domnitz had inquiry notice prior to a year before his complaint was filed, and therefore the statute of limitations expired before Mr. Domnitz filed his complaint. The Nevada Supreme Court determined that Mr. Domnitz knew or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action.

Contrary to Petitioner's contentions, the Nevada Courts followed the common sense

meanings and common understandings of the words found in NRS § 41A.097(2) and the factors and definitions of injury found in the case of Massey v. Litton, M.D., *Supra,* in deciding that the statute of limitations had run in this matter prior to Petitioner filing his complaint. The Nevada Supreme Court in the present matter neither created a new statute or a new interpretation of NRS § 41A.097(2) The citizenry of Nevada and their attorneys have a clear understanding of when the one (1) year statute of limitations as contained in NRS § 41A.097(2) and discussed in Massey v. Litton, M D., 99 Nev. 723, 728, 669 P 2d 248, 252 (1983) begins to run.

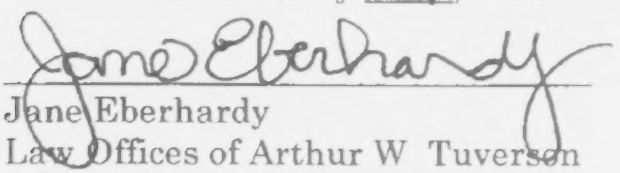
CONCLUSION

Petitioner has requested that this Court grant a Writ of Certiorari to review the Nevada Supreme Court decision in Richard Joel Domnitz v Lee M Reese, M.D , Feza N Gunalp, M D and Sunrise Mountainview Hospital, Inc. d/b/a Mountainview Hospital, (S.C. No. 54055)

It appears that Plaintiff is seeking a finding that a review on a writ of certiorari would be proper under U S Supreme Court Rule 10(c). As noted above the decision rendered by the District Court Judge and the Nevada Supreme Court in this matter was proper and followed both Nevada Statutory and Case Law Petitioner was not denied any rights under the United States or the Nevada Constitution His due process was not

violated. The factors outlined in United States Supreme Court Rule 10(c) are inapplicable to the facts of this case. Therefore, Petitioner's *Petition for Writ of Certiorari* should be denied.

Executed on January 19, 2011



Jane Eberhardy
Law Offices of Arthur W Tuverson
7201 West Lake Mead Blvd, #410
Las Vegas, Nevada 89128
Attorney for Respondent,
Feza N. Gunalp, M D